No. 7765

United States
Circuit Court of Appeals
For the Ninth Circuit

MARGARET B. BARRINGER and PHOENIX TITLE AND TRUST COMPANY, as Trustee,
Appellants,

vs.

GEORGE E. LILLEY, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, bankrupt, SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation, CENTRAL ARIZONA LIGHT AND POWER COMPANY, a corporation, COUNTY OF MARICOPA, a political subdivision of the State of Arizona, STATE OF ARIZONA, JOHN D. CALHOUN, County Treasurer of the County of Maricopa, State of Arizona, MITT SIMS, Treasurer of the State of Arizona, W. R. WELLS, RAYMOND L. NIER, J. ALLEN WELLS, E. L. GROSE and MAUDE M. GROSE, his wife, GLEN E. WEAVER, LUCILLE NICHOLS, NELLIE B. WILKINSON, SUSIE M. WALLACE, E. R. FOUTZ, THOMAS J. TUNNEY and WINDSOR SQUARE DEVELOPMENT, INC., the bankrupt corporation,

Appellees.

MOTION OF APPELLEE, GEORGE E. LILLEY, TRUSTEE IN BANKRUPTCY OF WINDSOR SQUARE DEVELOPMENT, INC., A CORPORATION, BANKRUPT, TO DISMISS OR AFFIRM, AND ARGUMENT THEREON.

THOMAS W. NEALON,
ALICE M. BIRDSALL,
Phoenix, Arizona
Counsel for Appellee, George E. Lilley.

TOPICAL INDEX

TABLE OF CASES CITED

STATUTES CITED

TEXT BOOKS

RULES

No. 7765

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

MARGARET B. BARRINGER and PHOENIX TITLE AND TRUST COMPANY, as Trustee,

Appellants,

vs.

GEORGE E. LILLEY, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, bankrupt, SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation, CENTRAL ARIZONA LIGHT AND POWER COMPANY, a corporation, COUNTY OF MARICOPA, a political subdivision of the State of Arizona, STATE OF ARIZONA, JOHN D. CALHOUN, County Treasurer of the County of Maricopa, State of Arizona, MITT SIMS, Treasurer of the State of Arizona, W. R. WELLS, RAYMOND L. NIER, J. ALLEN WELLS, E. L. GROSE and MAUDE M. GROSE, his wife, GLEN E. WEAVER, LUCILLE NICHOLS, NELLIE B. WILKINSON, SUSIE M. WALLACE, E. R. FOUTZ, THOMAS J. TUNNEY and WINDSOR SQUARE DEVELOPMENT, INC., the bankrupt corporation,

Appellees.

MOTION OF APPELLEE, GEORGE E. LILLEY, TRUSTEE IN BANKRUPTCY OF WINDSOR SQUARE DEVELOPMENT, INC., A CORPORATION, BANKRUPT, TO DISMISS OR AFFIRM, AND ARGUMENT THEREON.

Comes now George E. Lilley, Trustee in Bankruptcy of Windsor Square Development, Inc., a corporation, one of the appellees herein, by Thomas W. Nealon and Alice M. Birdsall, his counsel, and moves to dismiss with costs the appeal herein to this Court made by Margaret B. Barringer and Phoenix Title and Trust Company, on the following grounds:

That it is apparent from the record in this appeal that this Court was without jurisdiction to entertain such appeal in that:

1. The appeal was not taken in the time allowed by law.

2. There being no terms in bankruptcy the District Court lost jurisdiction over the parties and they were dismissed from further attendance at court upon the court making its order of December 13, 1934, affirming the order of the Referee, no motion or petition for rehearing having been filed in the cause subsequent to the order of December 13, 1934, and therefore the order of January 7, 1935, was void for want of jurisdiction.

3. The citation issued by this Honorable Court upon the allowance of the appeal by it, was never served upon appellees J. Allen Wells and Glen E. Weaver, although they were indispensable parties to the appeal

by reason of the fact that the order appealed from established substantial property rights in them, which would be adversely affected by a reversal or modification by this Court of the order of the District Court appealed from.

4. That the citation issued by the District Court of Arizona upon the allowance of the appeal in this matter, was never served upon appellee J. Allen Wells, who had a substantial property interest established by the order appealed from, which would be adversely affected by a reversal or modification by this Court of the order of the District Court appealed from.

5. That no praecipe for the Transcript of Record was ever served upon numerous of the appellees herein, and they therefore had no opportunity to see that a proper record to protect their interests was filed in this Court.

6. That the statement of evidence, required by Federal Equity Rule 75, was not settled by the *trial* judge and no notice or opportunity to be heard upon such settlement was given to any appellee.

7. That no notice of the filing of a petition for review or of the filing of a certificate of review by the Referee was ever served upon any of the appellees herein other than E. L. Grose and this appellee, and that only one other appellee made an appearance on review. That the order of the Referee being a final judgment in favor of numerous of these appellees, the District Court had no jurisdiction to hear said petition to review, and, the District Court being without jurisdiction in the premises, this Court is also with-

out jurisdiction to review the order of the District Court.

Under the foregoing facts the state of the record precludes any consideration of this appeal by this Honorable Court for the reason that they disclose that proper steps have not been taken by appellants to confer jurisdiction upon this Court, and for that reason this appeal should be dismissed.

WHEREFORE appellee, George E. Lilley, Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, asks this Honorable Court to dismiss the appeal filed by Margaret B. Barringer and Phoenix Title and Trust Company.

THOMAS W. NEALON

ALICE M. BIRDSALL
Counsel for appellee George E. Lilley, Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc. a corporation, Bankrupt.

MOTION TO AFFIRM

In the alternative, said appellee, George E. Lilley, Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, also moves this court to affirm said order entered by the District Court of the United States for the District of Arizona, from which order in the above entitled cause the appeal herein purports to have been taken, with costs to said appellee, on the ground that the questions on which the

decision of the cause depends are so unsubstantial as not to need further argument.

THOMAS W. NEALON

ALICE M. BIRDSALL

Counsel for Appellee, George E. Lilley, Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc. a corporation, bankrupt.

STATE OF ARIZONA
COUNTY OF MARICOPA } ss.

THOMAS W. NEALON, being first duly sworn, doth depose and say:

I have read the within Motion to Dismiss and, in the alternative, Motion to Affirm, in the above entitled matter, and know the contents thereof; and that the statements contained therein are true according to the best of my knowledge, information and belief.

THOMAS W. NEALON

SUBSCRIBED AND SWORN TO before me this 22 day of April, 1937.

W. F. DAINS
Notary Public in and for Maricopa County.

(NOTARIAL SEAL)

My commission expires:
October 28, 1938.

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

STATEMENT OF FACTS RELATING TO MOTION TO DISMISS, OR IN THE ALTERNATIVE TO AFFIRM

On the 28th day of October, 1930, Windsor Square Development, Inc., a corporation was adjudicated a bankrupt upon a voluntary petition in bankruptcy. (T. R. 571, 572). Thereafter on the 24th day of April 1931, appellant Barringer filed a proof of debt with a claim of lien incident thereto and asked that the property involved in this litigation be sold by the Bankruptcy Court. (T. R. 577-584). To this proof, objections were filed by this appellee. (T. R. 163, No. 60) The record does not disclose any ruling on the claim or the objections and does not show any objection to any ruling of the court in regard thereto.

Complying with the demand of appellant Barringer that the amount of this debt be determined so that she might bid upon the property at a sale by the Bankruptcy Court and apply the amount due her upon the purchase price thereof, and her further demand that all of the parties interested in the property be brought in, this appellee filed a petition to marshal liens, sell the property and transfer any liens or claims thereto to the fund derived from the sale, and establish the rights of the respondents in said property. (T. R. 168-175).

Upon a hearing, after due notice and opportunity to be heard, the Referee on the 17th day of September

1932, made his order adjudicating the rights of all parties in said property (T. R. 231-254).

Appellants filed a petition to review this order of the Referee and the Referee made his certificate of review to the District Court. Appellants, however, failed to give notice of the petition to review or the filing of the referee's certificate or of any hearing thereon to any of the respondents named in the petition to marshal liens, other than to this appellee and appellee E. L. Grose (T. R. 274). Only one other appellee, namely W. R. Wells, appeared in any hearing before the District Judge. The result was that none of the respondents other than this appellee, E. L. Grose and W. R. Wells were represented on the review in the District Court.

After many adjourned hearings in the District Court and the filing of various briefs therein, the District Court on the 13th day of December, 1934, made its order affirming the order of the Referee. (T. R. 412).

Thereafter, on December 17, 1934, counsel for appellee presented an oral ex parte motion to the court to vacate said order made on December 13th in order that he might file further authorities with the court. The court evidently believing he had the same control over an order in bankruptcy that he had over a decree in equity on the 17th day of December, 1934, vacated his order of December 13th, (T. R. 413) "for the purpose of allowing respondents ******* to file further authorities."

No notice was given to any person of this ex parte hearing, nor was any motion or petition for rehearing filed.

On January 7, 1935, the District Court made a further order affirming said order of December 13th, 1934, in which it recited "after an examination of authorities and a further consideration of the entire matter I see no reason to change my ruling." (T. R. 110).

On February 5, 1935, appellants filed two petitions for appeal, one in the District Court (T. R. 111), and one in this Court (T. R. 806). Citations were issued upon each of these petitions, but appellants failed to make any service upon J. Allen Wells or Glen E. Weaver of the citation issued by this Court (T. R. 82), and failed to make any service upon J. Allen Wells of the citation issued in the District Court (T. R. 805), although each of these parties had a substantial interest in the property that is the subject of this litigation and which was established in the order appealed from and which would be affected by any order or decree made by this Court in the premises.

A praecipe for Transcript of Record was served upon some, but not all, of the appellees (T. R. 138). Therefore, some of these appellees had no opportunity to see that the transcript of record properly set forth the record as it pertained to them.

No service was made upon any of the appellees, other than this appellee, of the praecipe for additional parts of the record. (T. R. 28).

On the 6th day of May 1936, appellants lodged a proposed statement of evidence. (T. R. 680). To this, objections were filed by this appellee (T. R. 694-780), he being the only person served with notice of

the lodgment thereof. After the filing of these objections no notice of any hearing for a settlement of the statement of evidence was given to this, or any other, appellee, as required by District Court Rule 38. The statement of evidence was not settled by the *trial* judge, although he was in the District and ready and able to settle the same. It was settled by Judge Ling (T. R. 681-2), who was subsequently appointed a judge of the District Court of Arizona, but who did not participate in any hearing of the case.

ARGUMENT

This appeal was not taken within thirty days from the entry of the Order of the District Court on December 13, 1934, affirming the order of the Referee, the petition for appeal having been filed on February 5, 1935.

> Sections 24 and 25 of Bankruptcy Act; U. S. Code, Title II, Ch. 4, Secs. 47 and 48.

No motion or petition for rehearing was ever filed in regard to the order of December 13, 1934. Under these circumstances we think there is no question but what the District Court after the entry of said order, lost jurisdiction both over the cause and the parties. That it might have recovered its jurisdiction, upon notice and opportunity to be heard to all those interested in the order so entered, by the filing of a motion or petition for rehearing within the time required by local rule 38, appears in the case of *Sandusky v. First Nat. Bank* of Indianapolis, 23 L. Ed. 155, 90 U. S. 289, where the court says:

> "The District Court, for all the purposes of its bankruptcy jurisdiction, is always open. It has no separate terms. Its proceedings in any pending suit are, therefore, at all times open for re-examination upon application therefor in an appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation.
>
> "Applications for such re-examination may be made by motion or petition, according to the circumstances of the case. Such a motion or petition will not have the effect of a new suit, but of a proceeding in the old one."

Instead of following the rule there laid down, counsel for appellants by an oral ex parte motion induced the court on December 17, 1934, to vacate the order above referred to, theretofore entered on December 13, 1934. Of this ex parte motion or order thereon appellees had no notice.

There being no terms in bankruptcy, the adjudication by the District Court was final and the respondents were no longer before the court. They were not charged with any proceedings thereafter. To hold that because there are no terms of court in bankruptcy, one could come in at any time and have an order of the court set aside would be contrary to the whole spirit of the Bankruptcy Act, which contemplates expeditious proceedings. Furthermore, as said in the *Sandusky* case, supra, the right is limited to cases where "rights have not become vested under it which

will be disturbed by its vacation." The evils of procrastination in these matters is well illustrated by the present case which the skilful conduct of counsel for the appellants has kept in court for a period of more than six years.

In the case of In re *L. H. Seifer & Sons, Inc.* 78 Fed. (2) 196 (7th C C A), it was held that an order made vacating a former order was a nullity because it appeared to be a mere device for extending the period within which the defeated party in the court below might perfect his appeal. (Certiorari was denied in this case. 206 U. S. 618, 80 L. Ed. 438). In that case, no motion or petition for setting aside of the order for a reconsideration on their merits or otherwise, of the issues involved, was made by appellants.

The court will note the similarity in the instant case where the order of December 17th vacating the order of December 13th, was obtained by means of an oral ex parte motion, of which no notice was given, and was made for the purpose of enabling counsel to file a further memorandum of authorities. (T. R. 110). This, of course, could not afford any basis for a motion or petition for rehearing, because no sufficient grounds appeared therefor.

It is a general rule recognized in the state courts that the control of a court over its judgment, where no terms are provided, is lost upon the entry of the judgment, and that subsequent orders or judgments made thereafter vacating the same or making new orders in place of the one vacated are void.

Section 442, Vol. 34, Corpus Juris, p. 220, states:

"WHERE TERMS ABOLISHED. Where terms of court are abolished, and the court is deemed to be continuously in session, the general rule of control during the term has no application, and relief against a final judgment may be had only in the manner and within the time provided by statute *** ".

The order of January 7, 1935 was, therefore, in the opinion of counsel for the appellees, void for want of jurisdiction, and, therefore, the appeal, not being taken within the time provided by the Bankruptcy Act, conferred no jurisdiction upon this court.

The record discloses affirmatively that the citation issued by this Court was never served upon J. Allen Wells or Glen E. Weaver. The order appealed from establishes property rights in each of these appellees. They were, therefore, indispensible parties to the appeal. Further, the citation issued by the District Court was not served on J. Allen Wells.

We contend that these parties being indispensible parties whose property rights would be affected by any reversal or modification by this court of the order appealed from, this court is without jurisdiction to entertain the appeal. That all parties whose interest would be effected by the decision on appeal must be made parties is held in the following cases:

Gregory vs. Stetson
133 U. S. 579
33 L. Ed. 792

Terry vs. Abraham
93 U. S. 38, 23 L. Ed. 794

Board of Councilman vs. Deposit Bank
120 Fed. 167

Gray vs. Grand Forks Merc. Co.
138 Fed. 344 (8 C.C.A.)

The praecipe for the transcript of the record was served upon some of the appellees, but there were numerous appellees upon whom it was not served, and the praecipe for additional portions of the record was served upon no appellee other than this one. Therefore, such appellees had no opportunity to see that a proper record to protect their interest was filed in this court.

In the case of *Wade v. Leech*, 2 Fed. (2) 367 (5 C. C.A.) this was held a sufficient ground for dismissing the appeal.

No notice of the filing of a petition for review or the filing of the referee's certificate for review was ever given to any of the appellees other than this appellee and E. L. Grose, and only one other appellee, W. R. Wells, appeared at the hearing.

As a review of the Referee's order is equivalent to an appeal, due process requires that notice and opportunity to be heard be given to all who would be affected by the order of the District Court upon review. In an appeal to this Court citation must be issued to give jurisdiction over the person. The same, we believe to be true, on a petition to review an order of the Referee.

That an order of the Referee is equivalent to a final judgment in cases similar to this one, is held in the case of *Lewith v. Irving Trust Company*, 67 Fed (2) 854 (2 C.C.A.). Numerous cases are cited therein.

It is our contention that preliminary to any review in this court there must be jurisdiction in the District Court to review the order of the Referee. Otherwise the original order of the Referee stands as a final judgment in the premises.

The statement of evidence required by Federal Rule 75 was not settled by the *trial* judge, Honorable Fred C. Jacobs, although he was in the District and able and willing to settle the same. Nor was any notice or opportunity to be heard upon such settlement given to any appellee. The result was that the statement of evidence does not, in the opinion of counsel for this appellee, comply with the provisions of Equity Rule 75, and is not such a statement of evidence as the appellees are entitled to have.

In this connection we wish to point out that certain duties are placed upon the trial judge by Equity Rule 46 which indicates clearly that it is his duty to preserve notes upon matters appearing at the trial, particularly so in regard to the rejection or admission of evidence and to the making of objections thereto and taking exceptions from the rulings. We, therefore, desire to point out that these duties could not be performed by any one other than the trial judge unless in a case of emergency, as of death or sickness, and the succeeding judge might then take testimony upon a hearing and determine these facts for himself, as has sometimes been done in cases of bills of exceptions.

Appellee respectfully submits, therefore, that this appeal should be dismissed for the reason that the court has acquired no jurisdiction to determine this cause by reason of the failure of the appellants to take the proper steps to invoke the jurisdiction of the court.

Since the above authorities and discussion cover all matters raised by the alternative motion to affirm, in the interests of brevity no separate argument is submitted in connection therewith.

Respectfully submitted,

THOMAS W. NEALON

ALICE M. BIRDSALL

Counsel for Appellee, George E. Lilley, Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation.